Supreme Court, U.S.
FILED
MAY 17 1999
CLERK

(2)

No. 98-1481

In the Supreme Court of the United States

NORMAN P. KOSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
THOMAS M. GANNON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1488

QUESTION PRESENTED

Whether the district court correctly instructed the jury on the mental state necessary to establish that petitioner committed mail fraud and false-statement offenses.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Bates v. *United States*, 520 U.S. 1253 (1997)	11
Cupp v. *Naughten*, 414 U.S. 141 (1973)	8
Green v. *United States*, 474 U.S. 925 (1985)	11
Gross v. *United States*, 506 U.S. 965 (1992)	11
Pereira v. *United States*, 347 U.S. 1 (1954)	6
Sullivan v. *Louisiana*, 508 U.S. 275 (1993)	10
United States v. *Dockray*, 943 F.2d 152 (1st Cir. 1991)	8, 9
United States v. *Gambler*, 662 F.2d 834 (D.C. Cir. 1981)	9
United States v. *Gigot*, 147 F.3d 1193 (10th Cir. 1998)	7
United States v. *Gross*, 961 F.2d 1097 (3d Cir.), cert. denied, 506 U.S. 965 (1992)	9
United States v. *Hopkins*, 744 F.2d 716 (10th Cir. 1984)	10
United States v. *Huntsman*, 959 F.2d 1429 (8th Cir.), cert. denied, 506 U.S. 870 (1992)	7
United States v. *Mancuso*, 42 F.3d 836 (4th Cir. 1994)	8, 9
United States v. *McElroy*, 910 F.2d 1016 (2d Cir. 1990)	8
United States v. *Rochester*, 898 F.2d 971 (5th Cir. 1990)	9
United States v. *Ruiz*, 105 F.3d 1492 (1st Cir. 1997)	6

Cases—Continued: Page

United States v. *Sarno*, 73 F.3d 1470 (9th Cir. 1995), cert. denied, 518 U.S. 1020 (1996) 8
United States v. *Schwartz*, 787 F.2d 257 (7th Cir. 1986) 9
United States v. *Storm*, 36 F.3d 1289 (5th Cir. 1994), cert. denied, 514 U.S. 1084 (1995) 8, 9
United States v. *Walker*, 26 F.3d 108 (11th Cir. 1994) 8, 9
United States v. *Wilson*, 134 F.3d 855 (7th Cir.), cert. denied, 119 S. Ct. 216 (1998) 5
Von Hoff v. *United States*, 520 U.S. 1253 (1997) 11
Willis v. *United States*, 87 F.3d 1004 (8th Cir. 1996) 10

Statutes:

15 U.S.C. 714m(a) 2, 6, 7
18 U.S.C. 1014 (Supp. II 1996) 8
18 U.S.C. 1341 ..... 2, 6
18 U.S.C. 1956(a)(1)(B)(i) 2
18 U.S.C. 2314 2

In the Supreme Court of the United States

No. 98-1481

NORMAN P. KOSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 163 F.3d 1008.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1998. The petition for a writ of certiorari was filed on March 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner

was convicted on nine counts of making false statements to the Commodity Credit Corporation (15 U.S.C. 714m(a)); on ten counts of mail fraud (18 U.S.C. 1341); on six counts of money laundering (18 U.S.C. 1956(a)(1)(B)(i)); and on four counts of causing the interstate transportation of a security obtained by fraud (18 U.S.C. 2314). The district court sentenced him to a term of 78 months' imprisonment, to be followed by a three-year period of supervised release. In addition, petitioner agreed to forfeit $705,795. Gov't C.A. Br. 2-3. The court of appeals affirmed. Pet. App. 1-10.

1. Between 1990 and 1995, petitioner devised a scheme to defraud the Commodity Credit Corporation (CCC), a government corporation that finances federal farm programs. In that scheme, petitioner helped two individuals and a landlord file forms falsely declaring their eligibility for certain disbursements from the CCC; the money was then funneled back to petitioner. Petitioner used straw men for those transactions because he was so deeply in debt to the CCC that any payment he personally could have earned would have been withheld to reduce that debt. See Pet. App. 2-6.

2. Petitioner's defense at trial was that he had made no misrepresentations to the government. He further contended that all of his actions were taken in good faith to preserve his farming operation. At the close of the evidence, he asked the district court to read the jury two "good faith" instructions: one for the false-statement charges and one for the mail fraud charges.

Pet. App. 6.[1] The district court refused the request because, among other reasons, the mens rea elements of

---

[1] Petitioner's proposed instruction on the false-statement charges would have read, in part:

> The good faith of the defendant is a complete defense to the charge of making false statements * * * because good faith on the part of the defendant is simply inconsistent with a finding of knowingly and willfully making false statements as alleged in the charge.
>
> A person who acts on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect or wrong. An honest mistake in judgment does not rise to the level of knowledge and willfulness required by the statute.
>
> The law is intended to subject to criminal punishment only those people who knowingly and willfully attempt to deceive. While the term good faith has no precise definition it means among other things, a belief or opinion honestly held, an absence of malice or ill will and an intention to comply with known legal duties.
>
> * * * * *
>
> The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in the case. It is the government's burden to prove to you beyond a reasonable doubt that the defendant acted knowingly and willfully to make false statements.

Gov't C.A. Br. A1 (quoting Def.'s Proposed Instr. No. 3). Petitioner requested a similar instruction with respect to the mail fraud counts. That instruction would have read, in part:

> The good faith of the defendant is a complete defense to the charge of mail fraud * * * because good faith on the part of the defendant is simply inconsistent with the intent to defraud alleged in that charge. * * * An honest mistake in judgment does not rise to the level of an intent to defraud.

Gov't C.A. Br. A2 (quoting Def.'s Proposed Instr. No. 4).

the mail fraud and false-statement charges encompassed any good faith defense. *Id.* at 6, 9; Gov't C.A. Br. 19. Then, with respect to the mail fraud offense, the court instructed the jury that it could find petitioner guilty only if it found:

> First, that [petitioner] *knowingly devised a scheme* to defraud as described in the indictment;
>
> Second, that for the purpose of carrying out the scheme or attempting to do so, [petitioner] used the United States mails or caused the United States mails to be used in the manner charged in the particular count;
>
> Third, that [petitioner] did so *knowingly* and with the *intent to defraud.*
>
> * * * * *
>
> As used in this case, a scheme means some plan or course of action intended to deceive the Commodity Credit Corporation (CCC) and to deprive it of something of value by means of false pretenses, representations, or promises.
>
> * * * * *
>
> As used in this case, the phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive the Commodity Credit Corporation in order to cause the loss of money or a financial gain to the defendant.

Pet. App. 7-8 (emphasis added by court of appeals). And, on the false-statement charges, the court instructed:

> To establish the offense of making a false statement . . ., the government must prove the following propositions:
>
> First, [petitioner] made a false statement;
>
> Second, the statement was material;
>
> Third, the statement was made *knowingly*; and
>
> Fourth, the statement was made for the purpose of influencing the Commodity Credit Corporation or for obtaining money disbursed by the Commodity Credit Corporation.
>
> * * * * *
>
> A statement is false if untrue when made and then known to be untrue by the person making it or causing it to be made.

Id. at 8-9 (emphasis added by court of appeals).

3. The court of appeals affirmed. Pet. App. 1-10. The court first noted that a defendant is entitled to an instruction on his theory of the case if: (1) the tendered instruction is a correct statement of the law; (2) the theory of defense is supported by the evidence; (3) the theory of defense is not part of the charge; and (4) the failure to give the instruction would deprive the defendant of a fair trial. *Id.* at 6 (citing *United States* v. *Wilson*, 134 F.3d 855, 864 (7th Cir.), cert. denied, 119 S. Ct. 216 (1998)). The court then found (*id.* at 7) that consideration of the third and fourth of these elements

led to the conclusion that the district court had properly declined to give petitioner's good faith instructions.

In particular, the court agreed with the district court's conclusion that the mens rea elements of the mail fraud and false-statement charges encompassed any good faith defense. Pet. App. 7, 9. The court observed (*id.* at 9) that the district court's mail fraud instructions required the jury to find that petitioner had "knowingly devised a scheme" to defraud and had acted with an "intent to defraud." It further observed that the false-statement instructions required the jury to find that petitioner had "knowingly" made a false statement. The court thus explained (*ibid.*) that the jury could not have found both that the prosecution had satisfied the mens rea elements set forth in the instructions and that petitioner had nonetheless acted in good faith. Thus, the court concluded (*ibid.*), petitioner's "good faith" defense was logically incorporated within the district court's charge, and the denial of the proposed instructions did not deprive him of a fair trial.

ARGUMENT

1. Petitioner renews his claim (Pet. 7-20) that he was entitled to a "good faith" instruction at trial. That claim lacks merit. In mail fraud prosecutions under 18 U.S.C. 1341, the government must establish, among other things, that the defendant knowingly participated in a scheme to defraud and that he had a specific intent to defraud. See, *e.g.*, *United States* v. *Ruiz*, 105 F.3d 1492, 1501 (1st Cir. 1997); see also *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). In false-statement prosecutions under 15 U.S.C. 714m(a), the government must prove that the defendant made a statement that was false, that he knew the statement was false, and that he made the statement for the purpose of influencing action by

the CCC or obtaining something of value under a statute applicable to the CCC. See, *e.g.*, *United States* v. *Gigot*, 147 F.3d 1193, 1196 n.2 (10th Cir. 1998); *United States* v. *Huntsman*, 959 F.2d 1429, 1437 (8th Cir.), cert. denied, 506 U.S. 870 (1992). Here, the district court fully instructed the jury on the mens rea elements of petitioner's offenses, and petitioner makes no argument to the contrary.

The instructions that petitioner sought would not have presented "good faith" as a separate affirmative defense to the charges against him. In particular, although petitioner now appears to suggest otherwise (Pet. 7; but cf. Pet. 11), those instructions would not have told the jury that, under some definition, "good faith" could somehow entitle him to an acquittal once the elements of the relevant offense had been established. Instead, the requested instructions would have told the jury that "good faith on the part of the defendant is simply inconsistent with the intent to defraud alleged in [the mail fraud] charge[s]" and "simply inconsistent with a finding of knowingly and willfully making false statements as alleged in the [false-statement] charge[s]."[2] Gov't C.A. Br. A1, A2 (quoting Def.'s Proposed Instr. Nos. 3, 4); see note 1, *supra*. Put

---

[2] Petitioner's proposed instructions on the false-statement charges made reference to a supposed "willfulness" element. As the prosecution observed at the charge conference, however, "the element of willfulness isn't in this case." Gov't C.A. Br. A4; see 15 U.S.C. 714m(a) (imposing criminal sanctions on "[w]hoever makes any statement knowing it to be false, *or* whoever *willfully* overvalues any security, for the purpose of influencing in any way the action of the [CCC]") (emphasis added). The petition presents no claim that the district court erred by failing to include a "willfulness" instruction or that the absence of such an instruction could itself give rise to any right to a "good faith" instruction.

another way, petitioner asked the district court to repeat, in other phraseology, what it had already told the jury when instructing it on the mens rea elements of these offenses: that it could find petitioner guilty only if it found that those elements were satisfied.

For that reason alone, the district court's refusal to give the proposed instructions was not in error. In instructing the jury on the elements of the offenses (see pp. 4-5, *supra*), the court adequately conveyed to the jury that it was required to acquit petitioner if it accepted the "good faith" theory reflected in the instructions he had proposed. See *United States* v. *Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), cert. denied, 514 U.S. 1084 (1995); see generally *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973) (jury instructions must be viewed as a whole). "There is nothing so important about the words 'good faith' that their underlying meaning cannot otherwise be conveyed. Thus, where the court properly instructs the jury on the element of intent to defraud—essentially the opposite of good faith—a separate instruction on good faith is not required." *United States* v. *Dockray*, 943 F.2d 152, 155 (1st Cir. 1991) (internal quotation marks and citation omitted).[3]

---

[3] See also *United States* v. *Sarno*, 73 F.3d 1470, 1487 (9th Cir. 1995) (no separate good faith instruction required for false-statement offense under 18 U.S.C. 1014 (Supp. II 1996)), cert. denied, 518 U.S. 1020 (1996); *United States* v. *Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994) ("If the district court gives adequate instruction on specific intent, a separate instruction on good faith is not necessary."); *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994) (finding of specific intent to deceive precludes finding of good faith); *United States* v. *McElroy*, 910 F.2d 1016, 1025-1026 (2d Cir. 1990) (where district court instructs on all elements of "knowledge" crime, no reversible error in refusing to instruct on good

2. Petitioner contends (Pet. 11-13) that the Eighth and Tenth Circuits require a separate instruction on good faith in these circumstances and that there is thus a conflict that requires this Court's review. While there is minor disagreement among the circuits, this Court has repeatedly declined requests to resolve it, and it should do so here as well.

The clear majority of circuits have now held that it is not reversible error for a district court to refuse to give a separate instruction on good faith if the other instructions, taken as a whole, adequately convey to the jury the essence of the defendant's good faith defense—for example, by explaining to the jury that the government must prove that the defendant acted with the mens rea applicable to the particular offenses with which he is charged. See *Dockray*, 943 F.2d at 155 (First Circuit); *United States* v. *Gross*, 961 F.2d 1097, 1103 (3d Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994); *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981). Moreover, the trend in the circuits is clearly away from requiring a separate instruction on good faith. The Fifth Circuit has largely abandoned its previous decision requiring such an instruction. See *Storm*, 36 F.3d at 1294-1295. And the Eighth Circuit, while formally adhering to its position that "a defendant is entitled to a good faith instruction where one has been requested and finds support in the evidence," recently denied

---

faith defense); *United States* v. *Rochester*, 898 F.2d 971, 979 (5th Cir. 1990) (jury "finding of specific intent to deceive categorically excludes a finding of good faith") (internal quotation marks omitted); *United States* v. *Schwartz*, 787 F.2d 257, 265 (7th Cir. 1986) ("'Good faith' is just the other side of knowingly making false statements.").

post-conviction relief to a defendant whose counsel had failed to request such an instruction. See *Willis* v. *United States*, 87 F.3d 1004, 1008 (8th Cir. 1996). The court reasoned that the instructions actually given, which "stated that a specific intent to defraud was required," were "adequate to convey to the jury that if it found that [the defendant] acted in good faith it could not find him guilty of bank fraud." *Ibid.*

As petitioner observes, the Tenth Circuit has held that "[t]he 'good faith' instruction is required to be given as a separate subject," even where the instructions otherwise set forth the mens rea elements of the offense. *United States* v. *Hopkins*, 744 F.2d 716, 717-718 (1984) (en banc). Like the Fifth Circuit, however, the Tenth Circuit may reconsider that position. Moreover, as a practical matter, it makes little difference whether a court specifically uses the term "good faith" in its jury instructions. Where, as here, the instructions correctly define the elements of the charged offenses, the absence of a separate good faith instruction should have no effect on any verdict.[4] There is thus no need for this Court to resolve the differences in approach between the court of appeals in this case and the Tenth Circuit in *Hopkins*. Indeed, since *Hopkins*, this Court has denied review in cases raising the same issue that is

---

[4] Because the only proper "good faith" instruction in this context would, in effect, inform the jury that it should acquit the defendant if it finds that the relevant mens rea element has not been satisfied, a finding that the mens rea element *has* been satisfied is the functional equivalent of a finding that the defendant did not act in good faith. For that reason, a failure to deliver such an instruction, even if it could somehow be characterized as "error," would always be harmless error so long as the jury was properly instructed on the mens rea element. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993).

presented here. See *Bates* v. *United States*, 520 U.S. 1253 (1997) (No. 96-7731); *Von Hoff* v. *United States*, 520 U.S. 1253 (1997) (No. 96-6518); *Gross* v. *United States*, 506 U.S. 965 (1992) (No. 92-205); *Green* v. *United States*, 474 U.S. 925 (1985) (No. 84- 2032).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
THOMAS M. GANNON
Attorney

MAY 1999